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Elliott Engle

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

24 February 1993

**MEMORANDUM**

**SUBMITTED LATE**
**AGENDA ITEM**
**For Meeting of: 2-25-93**

**TO: The Commission**

**FR: Lee Ann Elliott**
**Commissioner**

**RE: Draft Advisory Opinion 1993-2**

I agree with the result in the General Counsel's draft, but not with its rationale. Counsel's draft in today's opinion is premised on the analysis of Advisory Opinion 1983-16, which concluded a run-off following a special election is a "continuation of the general election campaign" and therefore not entitled to an additional expenditure limit under 2 U.S.C. § 441a(d).

While I agree that every special election does not merit its own separate §441a(d) limit, I do not agree with the reasons OGC advances. As Commissioner Aikens and I said in our Statement to Advisory Opinion Request 1992-39, "[n]owhere in the FECA is there a definition of, or provision for, a 'continuation of an election'". In fact, we consider that phrase's use in 1983-16 to have been erroneous. Statement of Commissioners Aikens and Elliott to Advisory Opinion Request 1992-39 at page 2.

I also criticized using the word "campaign" as a legal term (as opposed to using the FECA's legally-defined word "election") in Advisory Opinion 1986-31. In that opinion, I joined Commissioner Josefiak's concurrence which said "the Act and Commission regulations do not define 'campaign,' and that word does not appear to have independent meaning in §441a(d)(3) within the phrase 'general election campaign'." Commissioner Josefiak also stated a "one-campaign concept ... is flatly inconsistent with the Act's provisions which do not use the word 'campaign' (and) [i]mplementation of the one-campaign concept would call for a nightmare of subjective line-drawing." Concurring Opinion of Commissioner Josefiak to Advisory Opinion 1986-31 at page 3. See also Concurrence of Commissioners Aikens & Elliott to Advisory Opinion 1986-31.

While the facts of today's request differ from Advisory Opinions 1992-39 and 1986-31, the criticisms I stated in those opinions of the rationale in Advisory Opinion 1983-16 are directly applicable in deciding today's request. In my opinion, 1983-16's use of a "continuing general election campaign" as a basis for legally analyzing §441a(d) is inappropriate, subjective and not based in the statute. I believe there is a better way to analyze these special election cases that is consistent with the result in 1983-16, but relies on the legally-defined term "election" in the FECA and other precedent.

In Advisory Opinion 1983-16, the Commission considered California's election law governing special elections. That law provided that all candidates for a vacancy, regardless of party affiliation, were required to enter an initial special primary election. If no candidate emerged with more than 50% of the vote from that primary, a special general election would be held. In granting §441a(d) limits for the first election in California, however, the Commission decided it had to rename the special primary as a "general" election. The Commission also renamed the California special general election a "run-off" election, and said a separate §441a(d) limit would not be available there since it would be the "continuation of the general election campaign.[1]

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1. Advisory Opinion 1983-16 cites Kellam v. Eu, 83 Cal. App. 3d 463, 466 (1978) in support of renaming the special primary as a general, and the special general as a run-off. But that is not persuasive to me, and is not all the opinion actually said. In Kellam, the court stated:

> Thus, what occurs in a special primary election is actually in effect a preliminary general election ... and a subsequent "run-off" general election ... if one of these many candidates does not receive a majority on the first ballot. (emphasis added)

If you literally follow the court's opinion, it is suggesting there are two general elections. This could mean there are two §441a(d) limits available there and in other special elections or run-offs. See, for example, Statement of Commissioners Aikens & Elliott to Advisory Opinion Request 1992-39. But the Commission did not follow that course in 1983-16, so I think the court's opinion is of limited precedential value.

In my opinion, it was unnecessary to rename the elections in California, and we should not apply that fiction in deciding today's request. The special primary election in California (and the initial special election in Texas, for that matter) can maintain their status as essentially "primary" elections, yet still have parties make §441a(d) expenditures in them, because of the Commission's decision in Advisory Opinion 1984-15.

In Advisory Opinion 1984-15, the Commission was asked, inter alia, whether the timing of certain expenditures would effect their characterization as coordinated party expenditures. Advisory Opinion 1984-15 at page 3. The Commission answered that "nothing in the Act, its legislative history, Commission regulations, or court decisions, indicates that coordinated party expenditures must be restricted to the time period between nomination and general election." The Commission continued:

> Where a candidate appears assured of his party's presidential nomination, the general election campaign, at least from the political party's perspective, may begin prior to formal nomination ... whether a specific nominee has been chosen, or a candidate assured of nomination at the time the expenditure is made, is immaterial.

Advisory Opinion 1984-15 at page 4. See also Advisory Opinion 1985-14 at pages 6-7 (expenditures pursuant to §441a(d) may be made before the party's general election candidates are nominated in Congressional elections). Further, the Commission has stated §441a(d) "does not by its terms refer to candidates for Federal office as the party's nominees; it refers to such candidates only as those who are 'affiliated with' the political party." Advisory Opinion 1984-15 at page 4, n. 4.

Accordingly, an election does not have to be named or renamed a "general" election before political parties may make coordinated expenditures. In my opinion, Commission precedent clearly allows political parties to make coordinated expenditures in primaries on behalf of candidates affiliated with that political party. In fact, this type of spending has become a fairly common practice.

Applying this principle to special elections, it follows that political parties may make coordinated expenditures on behalf of candidates in an initial multi-party special election.[2] There is no need to name or rename the primary a "general election" just to create the ability to make coordinated expenditures, nor is it necessary for parties to wait until the second special general election to begin spending. This means we do not have to reclassify the second special election as a run-off, it remains essentially a general election.[3]

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2. These initial special elections are often called, and essentially operate as, primary elections. They have the practical effect of narrowing all the primary contenders to the top two finishers, who will face each other in a special general. This second election meets the literal definition of a general, since it is "intended to result in the final selection of a single individual to the office at stake." 11 C.F.R. §100.2(b)(2) (emphasis added). Although the first election may result in one candidate taking office if he or she receives over 50% of the vote, it can't be said that is the intent (or usual outcome) of that election. If the first election does, however, produce an absolute winner, then that election has essentially operated as a general election. Being a general means §441a(d) expenditures could obviously have been made, and there is no subsequent election or "continuing general election campaign."

3. Because I view this as a series of primary and general elections, my support for two limits in the Georgia general and run-off elections is inapplicable to this case. But even if the Texas special elections are considered a general and a run-off, this case is distinguishable from the request in Advisory Opinion 1992-39. In Georgia, I applied two separate limits because there were essentially two separate general elections. Obviously, the regularly-scheduled November 3rd election was a general election, see 11 C.F.R. §100.2(b)(1), and the run-off (in addition to meeting the definition of 11 C.F.R. 100.2(d)(2)) was also "intended to result in the final selection of a single individual to the office at stake." 11 C.F.R. §100.2(b)(2). As Commissioner Aikens and I said in our Statement to 1992-39, I believe an election can be considered to be both a general and a run-off, and there is no support in the FECA for the restrictive definition of §100.2(b) the General Counsel advocated in its draft.

Although we did not have the benefit of Advisory Opinion 1984-15 at the time we decided 1983-16, we have it now and it should guide our decision in this matter.

Therefore, I request the General Counsel's draft be amended to delete the "continuing general election campaign" rationale of Advisory Opinion 1983-16 as the sole basis for deciding today's request. I am offering some additional language which allows the first election in Texas to be considered a primary and applies the rationale of 1984-15 to apply to special elections. Proposed language and modifications to the General Counsel's draft is attached to this memo.

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(Footnote 3 continued from previous page)

Also, Georgia was a very unique situation and does not lend itself to broad application. No other state has an absolute majority law in the general election as Georgia does, and I believe the 1992 Senatorial race is the only election to which the law had been applied. It is also reported the Georgia legislature is prepared to repeal this law in the near future.

- This amendment more accurately reflects what we did in CAL AO:

(1) The actual question we addressed in CAL (per their law) concerned a special primary and general
- we ended up calling it a a GENERAL + RUNOFF - but what we called it was NOT the question

(2) This change is really only stylistic - it think it reads better with out that phrase

individual to the office at stake. 11 CFR 100.2(b)(2). The regulations also provide that a special election is held to fill a vacancy and may be a primary, general, or run-off election.

The Commission has previously addressed the question of whether ~~a run-off~~ an election following a special general election would be considered a separate general election or a continuation of the general election for the purposes of 2 U.S.C. §441a(d). Advisory Opinion 1983-16. In that situation, the State of California held a "special primary" to fill a vacancy for a House seat. Under California law, all candidates of whatever affiliation ran against each other. If any candidate received a majority, he or she was declared the winner. If no candidate received a majority, a subsequent election was held and the candidates were limited to the top vote getter in each "political party or political body." The Commission determined that the first election, although it was labeled a "special primary" ~~and could be followed by a run-off~~, fit the definition of "general election" because it was held to fill a vacancy in a Federal office (i.e., a special election) and was intended to result in a final selection of a single individual. 11 CFR 100.2(b)(2). The Commission noted that this was consistent with a conclusion of a California appellate court in a 1978 decision.

The Commission also concluded that, in view of the circumstances of the special election process in California,

(3) This is part of the rationale in CA that, when stated this way, makes my alternative impossible. It is sloppy reasoning, and I have said before that elections can be more than one type. It is also language that is not critical to the opinion as written

(4) This change "generically" states The 2 elections in Texas it doesn't call them one thing or another. it defies the flat out statement That this is a definite general. rule so suggestion

the run-off could be viewed as a continuation of the general election campaign which began in connection with the first election.[1] The Commission further stated, however, that the run-off was not a separate or additional general election allowing for a new §441a(d) limit, and that only a single set of §441a(d) limits was allowable. ~~The Commission noted that, under Commission regulations, an election is classified according to one type only. See 11 CFR 100.2. With respect to special elections, no provision is made for characterizing the same election as both a general and a run-off election. See 11 CFR 100.2(f). Thus, only one section 441a(d) limit was available, but it could be utilized for both the first and second elections, i.e., the general and the run-off.~~

The Commission concludes that there is no practical difference between the situation presented in Advisory Opinion 1983-16 and the situation presented in Texas. Thus, there will be one section 441a(d) limitation applicable to the ~~special election together with any run-off.~~* ~~The special election scheduled for May 1 is a general election under 11 CFR 100.2(b)(2), i.e., it is being held to fill a vacancy in a Federal office and is intended to result in the final selection of a single individual to the office. The possible run-off election fits the definition distinguishing run-offs from general elections, i.e., "[t]he election held after a~~

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1/ The most significant circumstance was that, although there was a possibility that the first election would select an officeholder, there remained the possibility that a subsequent election would be needed.

(5) makes it generic

~~general election and prescribed by applicable State law as the means for deciding which candidate should be certified as officeholder elect." 11 CFR 100.2(d)(2).~~ *

As noted in Advisory Opinion 1983-16, this conclusion does not change the status of the ~~run-off~~ second election as a separate election for the purposes of the contribution limits in 2 U.S.C. §441a(a). These limits apply with respect to "any election" or "each election," and do not relate specifically to the determination of what constitutes a general election or a "general election campaign" for the purposes of section 441a(d). Compare 2 U.S.C. §441a(a)(1), (2), and (6), to 2 U.S.C. §441a(d).

The legislative history of the Act further supports the separate treatment and interpretation given to contribution limits under 2 U.S.C. §441a(a) and coordinated expenditure limits under 2 U.S.C. §441a(d). The Conference report for the 1976 amendments explains section 441a(d) as follows:

> This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection, these expenditures would be covered by the contribution limitations stated in subsections (a)(1) [section 441a(a)(1)] and (a)(2) [441a(a)(2)] of this provision.

H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976). This explanation separates the limited permission of party expenditures in 2 U.S.C. §441a(d) from the contribution limitations of 2 U.S.C. §441a(a). Furthermore, it indicates that section 441a(d), unlike section 441a(a), addresses the

(6) This is an unnecessary over statement and makes ~~[illegible]~~ alternative impossible - especially weakens you in GA

election process, rather than specific selection points within the process. See 11 CFR 110.1(b)(2), (b)(3)(i), and (j)(1); 110.2(b)(2), (b)(3)(i), and (i)(1). ~~The election process always has a single general election and the process may entail other elections either before or after the general election; e.g., nominating convention, popular primary, post-primary or post-general run-offs. All of these are focused on the general election, either as a means to narrow the field before the general election, or afterwards, if the general election is inconclusive.~~

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Scott E. Thomas
Chairman

Enclosure (AO 1983-16)

**INSERT LANGUAGE FOR DRAFT ADVISORY OPINION 1993-2**

**Commissioner Elliott**

Insert the following language on page 4, line 9:

In addition to considering an initial special election to be a general election, an alternative method of analyzing the special elections in Texas exists. The preliminary special election in Texas can be viewed as a primary election, since it has the practical effect of narrowing many candidates down to two nominees. 11 C.F.R. §100.2(c)(1). These nominees would participate in a subsequent general election that is "intended to result in the final selection of a single individual." 11 C.F.R. 100.2(b)(2). Political parties would still able to make coordinated expenditures during the first election, even if it is considered a primary, since the Commission has concluded that §441a(d)(3) expenditures may be made before the party's general election candidates are nominated. Advisory Opinion 1985-14. See also Advisory Opinion 1984-15.

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